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Supreme Court of the United States

No. 780

HARRY HAROLD CHERETON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

No.

HARRY HAROLD CHERETON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

SUMMARY STATEMENT OF MATTER INVOLVED

The Petitioner herein was originally indicted in Detroit in January of 1956 in a five-count Indictment, the first count of which was a conspiracy charge and each of the next four counts charged substantive violations of §152 of Title 18, U.S.C. The case finally came to trial in April of 1959. Approximately a week after the trial commenced the Court dismissed the conspiracy count (Count 1.) and the trial proceeded on the four remaining substantive counts. The Petitioner was, subsequently, convicted on each of the four remaining counts and sentenced to two years confinement on each count to run concurrently. Appeals were prosecuted and this Court denied Certiorari, 366 U.S. 924. Thereafter, your Petitioner filed a Petition with the District Court for a Writ of Error Coram Nobis supported by Affidavits of four of the twelve trial jurors. The District Court denied the petition and the Petitioner appealed to the United States Court of

Appeal for the Sixth Circuit who affirmed the lower court's verdict, 309 F.2d. 197. This matter is now before this Court on a Petition for Writ of Certiorari.

JURISDICTIONAL CONTENTION

It is the contention of the Petitioner herein that this Honorable Court has jurisdiction and should accept jurisdiction of this cause in that there is a conflict between the lower court's decision herein, same being **Chereton v. U. S. A.**, 309, F.2d. at 197, and other decisions of this Honorable Court as reported in the case of **Clyde Mattox v. U. S.**, 146 U.S. 140, and the subsequent decisions of **Stein v. New York**, 346 U.S. at 156, **McDonald v. Pless**, 238 U.S. at 264, and the case of **Hyde v. U. S.**, 225 U.S.

It is respectfully submitted that the decisions above referred to are in conflict each with the other and do not adequately lay down sufficient and adequate guide lines to guide the lower courts in their determination of the issues herein presented.

QUESTION PRESENTED

The question here presented for the Court's determination is:

SHOULD POST-TRIAL AFFIDAVITS OF JURORS BE RECEIVED AND CONSIDERED BY THE LOWER COURTS IN DETERMINING THE ISSUES PRESENTED BY A PETITION FOR WRIT OF CORAM NOBIS?

ARGUMENT

It is respectfully submitted that the above-posed questions should be answered in the affirmative. In this day and age of complicated litigation created in a large degree by the Government's reliance upon the provisions of Title 18, U.S.C. §371, relating to conspiracies and the difficulties encountered by the courts and defense counsel in the handling of trial of cases involving conspiracy counts and substantive counts in addition thereto, there can be no doubt that the trial courts exercise every effort to fully and completely instruct the juries so as to make every effort to insure the defendants a fair and impartial trial of criminal cases. This Court, in the case of **McDonald v. Pless (Supra)**, fully discussed this matter and said,

> "the rule on the subject has varied. Prior to 1785 a juror's testimony in such cases was sometimes received, though always with great caution. In that year Lord Mansfield in **Vaise v. Delaval**, 1 T.R. 11, refused to receive the affidavits of jurors to prove that their verdict had been made by lot. That ruling soon came to be almost universally followed in England and in this country. Subsequently, by statute in some states, and by decision in a few others, the jurors' affidavits as to an overt act of misconduct, which was capable of being controverted by other jurors, was made admissable and, of course, the argument in favor of receiving such evidence is not only very strong but unanswerable — when looked at solely from the standpoint of the private party who has been wronged by such misconduct."

The Court then went on to say,

> "If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation to the destruction of all frankness and freedom of discussion and conference?"

However, as in the case at bar where the only means open to the Appellant, Petitioner herein, is to use affidavits or testimony of the jurors, the Petitioner should, therefore, in attempting to assure himself of due process of law, be entitled to present and have considered by the lower courts affidavits made at the trial and executed by the jurors as the only means of assuring that which the **Constitution of the United States** grantees to all defendants in all criminal cases in the courts of the United States. In view of the fact that none of the foremen-tioned cases, wherein this proposition has been considered, lay down a true and absolute guide for the lower courts, it is respectfully submitted that this Honorable Court should invoke its jurisdiction to lay down guide lines for the lower courts in attempting to assure to all persons charged with crime a fair and impartial trial and due process of law.

Respectfully submitted,

O. B. CLINE, JR.,
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was this _____ day of January, 1963, mailed to the SOLICITOR GENERAL of the UNITED STATES, Department of Justice, Washington 25, D. C. and to LAWRENCE BUGOW, ESQ., United States Attorney, Main Post Office Building, Detroit, Michigan.

_____

O. B. CLINE, JR.

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Supreme Court of the United States

OCTOBER, 1962, Term

No. 780

HARRY HAROLD CHERETON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Miami 32, Florida

No. 14822

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HARRY HAROLD CHERETON,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Decided October 26, 1962.

Filed October 26, 1962. Carl W. Reuss, Clerk.

Before: MILLER, Chief Judge, McALLISTER and WEICK, Circuit Judges.

WEICK, Circuit Judge. This appeal is from an order of the District Court denying Chereton's petition for a Writ of Error Coram Nobis.

On January 6, 1956, in the District Court, the Grand Jury returned an indictment against Chereton containing five counts. The first count charged him with conspiracy to use the mails to defraud in violation of Sections 371

and 1341 of Title 18, U. S. C. and alleged three overt acts in furtherance of the conspiracy. The second, third, fourth and fifth counts of the indictment charged him with making false oaths in relation to a bankruptcy proceeding pending in that court entitled "In the Matter of Consolidated Radio & Appliance Company," in violation of Title 18 U. S. C. § 152. He was released on bond.

Chereton filed a motion to dismiss Count 1 of the indictment which was denied by the Court. An appeal was prosecuted to this Court which was dismissed on the ground that the order from which the appeal was taken was not a final appealable order. 256 F. 2d 576.

The case finally came on for trial before a jury on April 17, 1959. During the course of the trial on April 24, 1959, Chereton filed another motion to dismiss Count 1 of the indictment and the docket entries show that on April 28, 1959 "Count 1 was dismissed on motion of deft."

The case was submitted to the jury on May 5, 1959 only on the remaining counts, 2, 3, 4 and 5 of the indictment, which charged Chereton with making false oaths in relation to the bankruptcy proceeding. On the same day, the jury returned a verdict of guilty on each of the four counts. Chereton was sentenced to two years imprisonment on each of the four counts to run concurrently.

Chereton appealed from his conviction to this Court, on grounds other than now asserted, and the judgment of the District Court was affirmed. 286 F. 2d 409. Certiorari was denied by the Supreme Court, 366 U. S. 924. On May 31, 1961 the District Court continued Chereton's bond on appeal pending a decision by the Supreme Court on his

petition for rehearing filed in that Court. The Supreme Court denied rehearing on June 19, 1961, 366 U. S. 978.

On October 25, 1961 Chereton filed the present petition for a Writ of Error Coram Nobis in the District Court. The record before us does not indicate any proceeding pending in Court between the dates of June 19, 1961, when the Supreme Court denied rehearing, and October 11, 1961 when Chereton petitioned this Court for leave to file his Coram Nobis proceeding during which time Chereton was at large on the appeal bond which was to run only until the determination of the petition for rehearing.

The gist of the petition for Writ of Error Coram Nobis was that the jury, which had convicted Chereton on the only counts of the indictment which had been submitted to it, namely, Counts 2, 3, 4 and 5, had not really intended to convict him on those counts, but thought it was convicting him of the conspiracy and the three overt acts alleged in Count 1 of the indictment which count had been dismissed by the Court during the course of the trial and had never been submitted to the jury. The pertinent allegations of the petition are set out in footnote 1.

VIII

"That on or about July 14, 1961 the Petitioner herein had cause to be in Detroit, Michigan, to visit his brother who was ill at the time, and while there happened to have a discussion about his case with Mr. Louis M. Dunn who served as foreman of the trial jury that returned the aforementioned verdict of guilty as charged. During the course of the conversation with Mr. Dunn, Mr. Dunn expressed shock and dismay upon learning for the first time that your Petitioner had been convicted of Counts Two, Three, Four and Five of the aforementioned Indictment; the sworn Affidavit of Foreman Louis M. Dunn is attached and made a part of this Petition.

IX

That upon learning of the erroneous verdict, the said foreman of the jury, Louis M. Dunn, immediately set about in an attempt to locate other members that served on the jury; that the following jurors were located by Mr. Dunn and your Petitioner:

MARIE R. LABELLE, 6021 Frontenac, Detroit, Michigan;

At the hearing in the District Court the only proof offered in support of the Coram Nobis petition was the affidavits of four jurors attached thereto, which we will discuss later in the opinion. The statement was made that juror Bell had promised that he would be glad to testify before the trial court if called upon to do so. No proof was offered as to what his testimony would be. No statement was made nor proof offered by the seven remaining

LILLIAN H. GRANT, 8063 Lambert, Detroit, Michigan;
NONOUS D. COPLEN, 5848 Montclair, Detroit, Michigan;
WILLIAM M. BELL, 3378 Pasadena, Detroit, Michigan.

X

Upon discussing the aforementioned verdict with the foregoing jurors, all were in accord that the verdict had been in error and the sworn Affidavits of MARIE R. LABELLE, LILLIAN H. GRANT, NONOUS D. COPLEN and LOUIS M. DUNN, foreman, are attached to and made a part of this Petition.

XI

That juror, WILLIAM M. BELL, has promised that he will be glad to testify before the trial court if called upon to do so.

XII

From a reading of the aforementioned Indictment, it is easily understood why and how the jurors became confused as to the Counts involved. The foreman and the other aforementioned jurors all agree that they did not even discuss the guilt or innocence relating to Counts Two, Three, Four and Five of the Indictment and that it was the sole intent of the jury to find the Petitioner guilty on the four parts contained in Count One of the Indictment herein. None of the aforementioned jurors were aware of the fact at the time of their deliberations that Count One had been dismissed by the trial court. According to the attached Affidavits, none of the jurors believe the Petitioner guilty of Counts Two, Three, Four and Five of the Indictment herein. It is further apparent that when the jury returned to the jury box and were requested to announce the jury's findings in regard to Counts Two, Three, Four and Five, that they announced guilty, but that it was the unanimous opinion and belief of the jury that such verdict was in connection with and pertained to Count One of the Indictment herein and their subsequent announcement of guilty, for Counts Three, Four and Five was intended to be a finding of guilty on the various parts of Count One of the Indictment herein and not of Counts Two, Three, Four and Five of the Indictment.

XIII

Had this information been known to the trial judge, it would have precluded him from entering the judgment and sentence herein.

XIV

It is, therefore, apparent that the jury did not intend to convict your Petitioner for the Counts involving the false oath in bankruptcy contained in Counts Two, Three, Four and Five of the Indictment herein. It is further apparent by the sworn Affidavits that had it been known to the jury that Count One of the Indictment herein had been dismissed, that the jury would have unanimously presented a verdict of not guilty for your Petitioner and he would have been discharged.

jurors that they had made any mistake in the verdict they returned.

Chereton did not explain just how he "happened to have a discussion about his case" with the foreman of the jury two years after the verdict had been returned. No irregularity in connection with the verdict of the jury had been brought to the attention of the District Court until the filing of the Coram Nobis proceeding.

The District Judge, in his oral opinion, pointed out the improbability of the jury making any such mistake as Chereton claims. In his charge to the jury, the Court had submitted to the jury only Counts 2, 3, 4 and 5 of the indictment which related to the false oaths in the bankruptcy proceeding. With respect to Count 1 the Court specifically instructed the jury in plain language as follows:

> I further charge you that Count One of this indictment, which charged this defendant with entering into a conspiracy with the witness, Raymond Kaufman, has been dismissed by this Court for legal reasons, and you are not called upon to decide upon that charge, and you will not, therefore, consider this charge in any manner whatsoever (808). Since it has been dismissed by the Court, it is the same as if it had never been charged against Mr. Chereton, the defendant.

After the case had been submitted to the jury the following request was made by the jury to the Court: "The jury requests the transcript of the indictment of all four counts."

Later the jury advised the Court that "they just want the indictment."

The Court then, with the approval of counsel, manually cut out Count 1 from the indictment and sent to the jury the indictment which contained the only counts that had been submitted to it, namely, Counts 2, 3, 4 and 5. The very purpose of the deletion of Count 1 from the indictment was to avoid any possibility of confusion.

The following proceedings took place when the jury returned its verdict:

(At 3:00 P. M., the following proceedings were had.)

The Court: Bring in the jury.

(The jurors thereupon returned to the courtroom, and the following proceedings were had in their presence.)

The Clerk of the Court: Members of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk of the Court: What is your verdict as to the defendant, Harry Harold Chereton, as to the charges contained in Count Two of the indictment filed against him?

The Foreman: Guilty.

The Clerk of the Court: What is your verdict as to the defendant, Harry Harold Chereton, as to the charges contained in Count Three of the indictment filed against him?

(822) The Foreman: Guilty.

The Clerk of the Court: What is your verdict as to the defendant, Harry Harold Chereton, as to the charges contained in Count Four of the indictment filed against him?

The Foreman: Guilty.

The Clerk of the Court: What is your verdict as to the defendant, Harry Harold Chereton, as to the charges contained in Count Five of the indictment filed against him?

The Foreman: Guilty.

(The verdict was thereupon read to the jurors by the Clerk of the Court.)

The Clerk of the Court: And so say you all?

The Jurors: We do.

It is significant that the Clerk asked the jury separately what was its verdict on each of the four counts and the foreman responded "Guilty" on each count. The Clerk then read the verdict to the jury and asked "And so say you all?" The jurors: "We do."

While each juror was not polled individually, the jury was polled as a group and the jurors responded in open court that it was their verdict. Not a single juror indicated that he was confused or did not know what he was doing.

Where jurors in their jury room and in open court gave their unanimous assent to a verdict which was accepted by the court and the jury discharged, it is too late thereafter for individual jurors to change their minds and claim that they were mistaken or unwilling in the assent which they gave. Wigmore, *Evidence* (McNaughton Revision) § 2355 p. 717.

The instruction that the jurors were not to consider Count 1 was certainly clear and unambiguous. The District Judge placed no credence in the claim that the four jurors thought they were finding Chereton guilty of conspiracy and of the three overt acts alleged in the indictment instead of on Counts 2, 3, 4 and 5 which was their verdict. He considered it incredible that any juror, under the circumstances of this case, could have made such a mistake. Count 1 was a single count. The jury found Chereton guilty on four separate counts. There was no similarity between the unsubmitted Count 1 which charged conspiracy to use the mails to defraud and the submitted Counts 2, 3, 4 and 5 which, in effect, charged perjury in a Bankruptcy proceeding. The District Judge found it difficult to believe that the four jurors could remember for more than two years the complicated and technical conspiracy Count 1 and the three overt acts therein contained, on which they claim to have found Chereton guilty, when even some lawyers have difficulty in understanding conspiracy indictments at the time when

they are reading them. Particularly is this so since Count 1 was never explained to the jury by the Court, was never read by the jurors and had not been a part of the indictment sent to the jury room. It is one thing for jurors to make a unanimous mistake in respect to a matter actually submitted to them. It is something entirely different for individual jurors to claim that they found defendant guilty of an offense which was never submitted to them for their determination. The alleged mistake in this case was not made by all the jurors.

The District Judge carefully examined the four affidavits of jurors attached to the Coram Nobis petition. Only one was an original and the remaining three were carbon copies. All of the affidavits had blank spaces in which the names and addresses of the affiants had been inserted apparently after the affidavits had been typed. Two of the affidavits were identical in wording and the other two contained similarities.

Chereton argues that the District Court should have called in each of the jurors for examination. The District Judge did consider the affidavits as if the jurors had testified to the effect stated therein and concluded not to examine the jurors further. He decided that the jurors could not impeach their verdict by affidavits or testimony as to how or in what manner they arrived at it.

The testimony of jurors is not to be received "to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of jurors and can receive no corroboration." *Hyde* v. *United States*, 225 U.S. 347, 384.

The affidavits of the four jurors undertook to disclose their deliberations in the secrecy of the jury room. This involved a matter of public policy requiring the Court to consider the injury which might be inflicted upon the public if jurors were permitted to testify as to what happened in the jury room.

Courts have not favored inquisitions of jurors feeling that jurors may be intimidated, vexed or harassed thereby and that the practice might lead to dangerous consequences of jury tampering with the result that no verdict would be safe. *Stein* v. *New York*, 346 U.S. 156; *McDonald* v. *Pless*, 238 U. S. 264.

While there might be instances in which the testimony of jurors should not be excluded without violating the plainest principles of justice, *McDonald* v. *Pless*, supra; *Mattox* v. *United States*, 146 U.S. 140, in our judgment, this is not such a case.

We find no abuse of discretion in the handling of this matter in the District Court and its judgment is affirmed.

ORDER DENYING REHEARING
FILED DECEMBER 4, 1962

Upon consideration,

IT IS ORDERED that the Petition for Rehearing is denied.

s/ Paul C. Weick
United States Circuit Judge

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	3
Conclusion	4

CITATIONS

Cases:	
Hendrix v. *United States*, 219 U.S. 79	4
Hyde v. *United States*, 225 U.S. 347	4
McDonald v. *Pless*, 238 U.S. 264	4
Stein v. *New York*, 346 U.S. 156	4
United States v. *Mayer*, 235 U.S. 55	3–4
Statutes:	
18 U.S.C. 152	2

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 780

HARRY HAROLD CHERETON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 309 F. 2d 197. The oral opinion of the district court appears in the record at pp. 48a–51a.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1962. A petition for rehearing was denied on December 4, 1962. The time to petition for a writ of certiorari was extended by Mr. Justice Stewart to February 1, 1963, and the petition was filed on January 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an application for a writ of error coram nobis supported by affidavits of four jurors as to their intent in reaching a verdict was properly denied without a hearing.

STATEMENT

In 1959, in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts (counts 2–5) charging the making of false oaths in a bankruptcy proceeding in violation of 18 U.S.C. 152, and was given concurrent sentences of imprisonment for two years on each count. The conviction was affirmed on appeal, 286 F. 2d 409, certiorari denied, 366 U.S. 924.

After the denial of the petition for a writ of certiorari by this Court, petitioner, while still out on bond, filed a motion for a writ of error coram nobis in which he claimed that the jury had not intended to convict him of the substantive counts which had been submitted to them, but intended to convict him of conspiracy, as charged in count one, which had been dismissed at the close of the government's case. That count had charged a conspiracy to commit mail fraud by the use of a false financial statement. Petitioner supported his motion with the affidavits of four jurors to the effect that in announcing guilt on four counts they intended to find petitioner guilty of the four parts of the conspiracy charged in count 1, *i.e.*, (1) false financial statement, (2) using the mails to defraud, (3) defrauding creditors of the defunct corporation, and (4) conspiracy; that they did not intend

to find petitioner guilty of making false statements before the referee in bankruptcy (R. 17a–25a).

The record of the trial showed that the trial court specifically charged the jury that count one of the indictment "which charged this defendant with entering into a conspiracy with the witness Raymond Kaufman has been dismissed by this Court for legal reasons and you are not called upon to decide upon that charge, and you will not, therefore, consider this charge in any manner whatsoever" (R. 2b). Later, when the jury asked for the indictment, the court, with the approval of counsel, manually cut out count 1 from the indictment sent to the jury (R. 4b–5b). When the jury returned its verdict the clerk in open court specifically asked how the jury found as to each count, and the foreman answered as to each count. Thereafter the verdict was read, and the clerk asked: "And so say you all?" The jurors responded "We do." (R. 5b–6b).

The district court denied the motion. While it pointed out the improbability, in the face of the record as summarized above, that the jury would have made any such mistake as that claimed, it decided that the jurors could not impeach their verdict by affidavits or testimony as to the manner in which they arrived at the verdict (R. 48a–51a). The court of appeals affirmed, 309 F. 2d 197.

ARGUMENT

Aside from any question as to whether the issue which petitioner sought to raise would be cognizable by a writ of error coram nobis (see *United States* v.

Mayer, 235 U.S. 55), the rulings of the courts below were clearly correct. It is well settled that the testimony of jurors is not to be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of jurors impeaching their own verdict. *Hyde* v. *United States*, 225 U.S. 347, 384; *Hendrix* v. *United States*, 219 U.S. 79; *McDonald* v. *Pless*, 238 U.S. 264; see *Stein* v. *New York*, 346 U.S. 156.

The soundness of the rule established by the precedents is well illustrated by the facts of this case. In view of the transcript of the trial, there is serious doubt whether any juror could have been confused as claimed. It is more than doubtful that any jurors who could be thus confused would recollect with clarity alleged deliberations occurring two years before with respect to the elements of a count of the indictment which they had not seen and as to which the judge had not charged.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
Attorney.

FEBRUARY 1963.

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